

Board of Alien Labor Certification Appeals
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

DATE: April 3, 1997

NO: 95-INA-514

In the Matter of:

AIR TIGER EXPRESS (FLORIDA) INC.
Employer,

On Behalf of:

CHEN SUN,
Alien

Appearance: L. S. Rifkin, Esq., Miami, Florida.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Chen Sun (Alien), by Air Tiger Express (Florida), Inc., (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at Atlanta, Georgia, the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.¹

Statutory authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

available at the time of the application and at the place where the alien is to perform such labor;² and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

Statement of the case. On December 27, 1993, the Employer filed an application for labor certification to enable the Alien, who is a national of Taiwan, to fill the employment opportunity position of "Fiscal Viability Projections Consultant - Far Eastern Trade" in the Employer's International Air and Cargo Transport business at Miami, Florida. The duties of the position offered were described as follows in Form ETA 750:

Will investigate the current economic conditions of countries of the Pacific Rim, including: Taiwan Japan, Hong Kong, Korea and the Philippines. Based on sound econometric and financial analysis will provide for the guidance of the general management concrete projections regarding the economic changes, growth, and development potential impacting on the international air and ocean transport industry. Responsible for the formulation, presentation, and on-going critique of the economic and financial objectives and policies of the corporation's commercial interest in the Far East, taking into account changes in financing, and domestic and international monetary policies that regulate agricultural production, industry, and trade between the United States and Asia.

The educational requirement was a baccalaureate degree in Economics, with experience of six years in the Job Offered or in the Related occupation of Economic or Financial Analysis. The Other Special Requirements for the position are that the worker "Must hold a Bachelor's Degree, with major field of study in Economic, or the equivalent, as determined by a recognized international academic evaluation service." The position pays \$54,600 for a forty hour week from 9:00 AM to 5:00 PM. The Alien's immediate supervisor is the Employer's President, and the Alien will not supervise any other employees. The CO classified

²Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

this position as an Economist under Occupational Code No. 050-067-010. AF 118.

Alien's qualifications. The Alien's qualifications addressed the Employer's application criteria with his academic training in the Taiwanese university from which he graduated in 1981.³ From January 1982 to January 1985 the Alien was "Managing Director" of L. and J. Express, Inc., of Taipei, Taiwan, which was in the International Air and Cargo Transport business. From January 1989 to August 1989 the Alien was "Managing Director" of Jumbo Express Company, Limited, also of Taipei, Taiwan. The Alien worked as "Director" of the Air Tiger Express Company, an International Air and Cargo Transport company located in Taipei, Taiwan, from February 1990 to March 1991. From July 1991 to December 1993, the date of application, the Alien worked under the title of "Comptroller" of Air Tiger Express (Florida), Inc., which also is in International Air and Cargo Transport. Based on the Alien's description, his duties in the positions that he held from January 1982 to August 1989 as "Managing Director," from February 1990 to March 1991 as "Director," and from July 1991 to December 1993 as "Comptroller" were virtually identical. AG 430-431a.

Notice of Finding (NOF). Although the resumes of thirty-nine applicants were referred for this position by the Job Service of Florida, no U. S. workers were hired.⁴ On January 31, 1995, the CO advised the Employer in the NOF that certification would be denied on the record as it then stood, subject to rebuttal on or before March 7, 1995. AF 90-92.

(1) Citing 20 CFR § 656.21(g) at subsections (1) through (9), the CO found that Employer's advertisement was deficient because the job title was incorrect. The CO noted that the Employer used the title, "Fiscal Viability Projection Consultant - Far Eastern Trade" to describe the job, when the same position was classified in the DOT as "Economist." As the title Employer used is misleading and may have had a chilling effect on U. S. workers, the CO advised that proof of a good faith effort to test

³Notwithstanding the opinion in AF 87 that the Alien completed 120 semester credit hours equal to a major in Economics, it is observed that Mr. Chen initially failed the college level courses in Principles of Economics, Calculus, and International Economics, all of which he later passed after taking the courses a second time. His final grade was a passing "C" in General History of China, Accounting, Statistics, Political Science, Micro Economics, Logic, History of Western Economic Thought, Macro Economics, Business Practice, History of Chinese Economic Development, Business Law, Economic Policy, Calculus, and International Economics. His average for each of his four years was a passing "C." AF 86.

⁴The State agency sent follow up letters to all of the U. S. candidates, and it received responses from twenty-five of the applicants for the position.

the labor market would require Employer to demonstrate that the job opportunity was clearly open to qualified and available U. S. workers. 20 CFR § 656.20(c)(8). AF 93-94

(2) The CO then said that a good faith effort to recruit U. S. workers was lacking, noting that the job title was misleading, as discussed above. The CO then said that the Employer further discouraged the U. S. workers who applied for the position by sending them a letter the effect of which was chilling in its effect on ten of the thirty-nine applicants, who did not reply. Another ten of the thirty-nine U. S. applicants did comply with the Employer's demands, but it regarded their responses to be unsatisfactory, and it rejected their applications out of hand for this reason. The Employer was again advised that corrective action would require it to substantiate its capacity to pay the salary it offered for this job by producing its tax returned for the previous three years, its Articles of Incorporation, and pictures of its place of business. AF 94.

Rebuttal. On April 6, 1995, the Employer filed its response to the NOF, as directed. The Employer filed forensic opinions in support of its contention that the title, "Fiscal Viability Projections Consultant - Far Eastern Trade" was a more accurate and descriptive of the job than were the titles "Economist," "Economic Analyst," or Financial Economist," none of which, it contended, adequately described the position offered. For this reason, the Employer argued, the job title under which the position was advertised was correct and the advertisement was not defective under 20 CFR §§ 656.21(g)(1) through (9). The Employer then asserted that its letter responding to the applications was standard industry practice to verify eligibility for employment and document qualifications of the U. S. workers for the position offered, again relying on a forensic opinion for proof.

Final Determination. By the Final Determination (F) the CO denied certification on May 8, 1995. AF 14-15. Having considered the Application, the NOF, and Employer's Rebuttal, the CO found that Employer's Rebuttal did not present convincing proof that the Employer had conducted a good faith recruiting effort or that this job was "clearly open" to any qualified U. S. worker.

The CO concluded that the Employer's use of the job title, "Fiscal Viability Projections Consultant - Far Eastern Trade," rather than the DOT classification title, "Economist," in recruiting for the position was incorrect. The CO's inference was supported by the Employer's inaction in that it failed to question the Job Service finding which corrected the position title in accordance with the classification assigned to these job duties by the DOT at the time it filed this application.

Secondly, the CO found excessive the Employer's demand that the U. S. workers bring with them to any job interview documentation that they were lawfully permitted to work in the U. S., a certified copy of their university academic transcript, and detailed letters of reference from previous employers with regard to any industry job that was related to the position offered so that the Employer could verify the work experience of the respective applicants. Noting that some of the applicants did not respond to this letter and others had responded incompletely, the CO concluded that the Employer's letter to U. S. candidates for this position had discouraged the U. S. workers and did not show good faith on the part of the Employer, in view of the information Employer already had been supplied in the resumes it had received as to all thirty-nine applicants from the State job service. As the CO found that the Employer did not conduct a good faith recruiting effort and that the Employer's rebuttal was unpersuasive, the CO denied certification.

Discussion. The regulations at 20 CFR §§ 656.20(c)(8), 656.21(b)(7), and 656.24(b)(1) and (2)(ii) required the Employer to exercise good faith in addressing the qualifications of the U. S. candidates who applied and were referred for the job at issue in this proceeding. In the absence of further evidence to the contrary, the Employer's rejection of the U. S. applicants in favor of the Alien could not be regarded as arising from lawful job-related reasons.⁵

(1) First, the CO's classification of the position as "Economist," rather than Employer's job title, "Fiscal Viability Projections Consultant - Far Eastern Trade," requires that on appeal the DOT Classification, the Employer's application, and the Employer's arguments in response to the NOF be compared to determine whether or not the CO was in error in concluding that the Employer's position description was misleading and should not have been used for recruitment under the Act and regulations.

The issue addressed by the CO turns on DOT classification No. 050.067-010, entitled "Economist (profess. & Kin.) alternate titles: economic analyst":⁶

⁵The Employer has the burden of proof on issues as to whether or not its rejection of U. S. workers was lawful. **Cathay Carpet Mill, Inc.**, 87-INA-161(Dec. 7, 1988)(en banc).

⁶Also, DOT entry 050.067-014 describes a standard occupation in economics under the title, "Market research Analyst I (profess. & kin.)," as follows: Researches market conditions in local, regional, or national area to determine potential sales of product or service: Establishes research methodology and designs format for data gathering, such as surveys, opinion polls, or questionnaires. Examines and analyzes, statistical data to forecast future marketing trends. Gathers data on competitors and analyzes prices, sales, and methods of marketing and distribution. Collects data on customer preferences and

Plans, designs, and conducts research to aid in interpretation of economic relationships and in solution of problems arising from production and distribution of goods and services: Studies economic and statistical data in area of specialization, such as finance, labor, or agriculture. Devises methods and procedures for collecting and processing data, utilizing knowledge of available sources of data and various econometric and sampling techniques. Compiles data relating to research area, such as employment, productivity, and wages and hours. Reviews and analyzes economic data in order to prepare reports detailing results of investigation, and to stay abreast of economic changes. Organizes data into report format and arranges for preparation of graphic illustrations of research findings. Formulates recommendations, policies, or plans to aid in market interpretation or solution of economic problems, such as recommending changes in methods of agricultural financing, domestic and international monetary policies, or policies that regulate investment and transfer of capital. May supervise and assign work to staff. May testify at regulatory or legislative hearings to present recommendations. May specialize in specific economic area or commodity and be designated Agricultural Economist (profess. & kin.); Commodity-Industry Analyst; (profess. & kin.); Financial Economist (profess. & kin.); Industrial Economist (profess. & kin.); International-Trade Economist (profess. & kin.); Labor Economist (profess. & kin.); Price Economist (profess. & kin.); Tax Economist (profess. & kin.).

The forensic opinion offered in Employer's rebuttal argues that the duties stated above are distinguishable from the position described in its application, and that the positions are "significantly dissimilar and different." The reason is that the work of a "Fiscal Viability Projections Consultant - Far Eastern Trade" involves investigating the current economic conditions of countries of the Pacific Rim, including: Taiwan, Japan, Hong Kong, Korea, and the Philippines with the ultimate objective that the investigation will serve as a foundation for the formulation, presentation and on-going critique of the economic and financial objectives and policies of the Employer's commercial interests in the Far East. AF 47

As the Employer did not disclose the objectives and policies of its "commercial interests in the Far East," the record does not provide sufficient information on which to judge the nature or scope of the occupational task suggested in this context. The meaning of this argument is found in the "expert's" remark that "The duties to be performed by an Economist or Economic Analyst

buying habits. Prepares reports and graphic illustrations of findings.

or Financial Economist, ... are a general and generic description of a typical position in economics." By contrast, the duties of the job offered by Employer are "quite particular and specific in nature, describing a specialized position oriented to the in-depth investigation of the current economic conditions of countries in a quite localized geographic region of the world."

By offering this opinion as expert evidence in favor of its own position, the Employer concedes that the work to be performed in the position it offers is encompassed by the list of duties more broadly described in Classification No. 050.067-010, as quoted above. The sole point of divergence, in other words, is the more elaborate statement of the job duties in Employer's application and nothing more. While the DOT is not applied mechanically, it serves as a guideline to the nature and content of the position in question. See **Trilectron Industries, Inc.**, at 90-INA-188(Dec. 19, 1991) and 90-INA-176(Dec. 19, 1991). In this case the DOT job classification clearly encompassed the job the Employer's application seeks to fill.

This inference is further supported by both the Employer's more restrictively drawn "Job to be Performed (Duties)," and its statement of educational requirements as a Bachelor's Degree in Economics as the Major Field of Study, while the experience the Employer required is either six years in the Job Offered or six years in the Related Occupations of "Economic or Financial Analysis." AF 118. This is clearly a broad and unspecialized background for the highly specialized duties the Employer states for the position at issue. Based on the Employer's application for certification, the Employer's evidence in rebuttal, and the description of the position in DOT Classification No. 050.067-010, it is concluded that the CO correctly found that Employer's position description was incorrect and that its advertisements of the job were misleading.

(2) The Employer's assertion that its recruitment effort was conducted in good faith was rejected by the CO because of the Employer's letter requiring that the U. S. workers produce certified records that it intended to use in the verification of qualifications at each of the job interviews.

As the Employer did not suggest that any of the U. S. workers was not qualified, its representation that it was engaged in investigating all of the thirty-nine candidates to whom it sent requests for further details implies that those candidates met its major job requirements. **Gorchev & Gorchev Graphic Design**, 89-INA-118(Nov. 29, 1990(en banc); and see **Dearborn Public Schools**, 91-INA-222(Dec. 7, 1993)(en banc). The CO concluded, however, that the documentation of qualifications the Employer demanded in its letter as a prerequisite to the job interview had a chilling effect that tended to discourage the U. S. applicants and as a result the process, itself, had a material impact on

recruitment under the Act and regulations. While BALCA has held in **Bobco Metals Company**, 92-INA-372 (May 18, 1994), that written inquiries may be used, the Employer is not permitted to use this as a device to place unnecessary burdens on the recruitment process under **Lin and Associates**, 88-INA-007(Apr. 4, 1989)(en banc), or otherwise to have the effect of discouraging U. S. applicants. **Vermillion Enterprises**. 89-INA-043(Nov. 20, 1989).

Summary. This case presents facts and issues that parallel the record in **Rysan, Inc.**, 94-INA-606(Sept. 12, 1995), where the employer advertised for a "Profitability Maintenance Specialist" although the CO found that the correct job title was "Economist," a deviation that had a chilling effect on employer's recruitment effort. In that case the panel did not address the issue of the job title because it found that employer's request for excessive documentation had discouraged applicants from pursuing the job offer, which demonstrated the lack of good faith recruitment. As in the instant case, the employer in **Rysan** required that at the time of the interview the U. S. applicants present the same documentation this Employer has required of the thirty-nine U. S. workers who answered this job advertisement, despite the creative job title that it used in place of "Economist." We conclude for these reasons that the Employer has failed to demonstrate that it made a good faith effort to recruit U. S. workers and we affirm the denial of certification by the CO. **H. C. LaMarch Ent. Inc.**, 87-INA-607(Oct. 27, 1988).

Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

AIR TIGER EXPRESS (FLORIDA) INC., Employer
CHEN SUN, Alien

CASE NO: 95-INA-514

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:
	:	CONCUR	:	DISSENT
	:	:	:	COMMENT
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Holmes	:	:	:	:
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Huddleston	:	:	:	:
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Thank you,

Judge Neusner

Date: March 19, 1997